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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SAITH NA,

12 Plaintiff,

13 v.

14 SIMMONS et al.,

15 Defendants.
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Case No.: 16-CV-592-WQH(WVG)

**REPORT AND
RECOMMENDATION ON
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
PLAINTIFF'S MOTIONS FOR
APPOINTMENT OF COUNSEL**

[ECF Nos. 37, 38 & 44.]

18 Saith Na, an inmate at Pelican Bay State Prison in Crescent City, California, filed
19 the instant lawsuit under the Civil Rights Act, 42 U.S.C. § 1983, alleging violation of the
20 Eighth Amendment based on the alleged inhumane conditions of his confinement. (ECF
21 No. 21.) Defendants Simmons, Hvizdzak, Aliyev, B.I. Myers, Talamante, Garcia,
22 McHenry and Maul now seek summary judgment on this claim. (ECF No. 38.) Having
23 considered the Motion on the papers submitted, the Court hereby RECOMMENDS that
24 Defendants' Motion for Summary Judgment be DENIED.

25 Also pending before the Court are Plaintiff's motions for appointment of counsel.
26 (ECF Nos. 37, 44.) Given the Court's recommendation above, the Court also
27 RECOMMENDS that Plaintiff's motions be GRANTED and pro bono counsel be
28 appointed to represent him.

I. BACKGROUND

A. Plaintiff's Statement of Facts¹

In 2015, Plaintiff was housed at the George Bailey Detention Facility in San Diego, California. (*See* FAC at 1.)² On April 5, 2015, Plaintiff alleges that he was escorted to “Cell #110” by San Diego Sheriff Deputies.³ (ECF No. 45, Na Decl. at ¶ 4.) One of those Deputies, Defendant Aliyev, went inside the cell, “dragged out a wet mattress filled with water along with wet linen” and placed the items outside of the cell. (*Id.* at ¶ 5.) Plaintiff alleges that Defendants Garcia, Aliyev, Hvizdzak, and other Deputies “observed that the cell was flooded” and “in inhumane condition.” (*Id.* at ¶ 2, 4-7.) Despite the cell’s condition, Plaintiff claims Defendant Garcia ordered him to go inside the cell. (*Id.* at ¶ 4.) Plaintiff protested but alleges Garcia told him to “get the fuck inside the cell” while holding out his taser. (*Id.*)

Plaintiff claims that there was “food splattered all over the cell wall,” the “water from the toilet bowl was empty,” and there was urine and feces near the toilet. (*Id.* at ¶ 2.) Plaintiff alleges he repeatedly asked Defendants Aliyev and Hvizdzak for cleaning supplies when they came by his cell, but they failed to provide any. (*Id.* at ¶ 7.)

That evening, Plaintiff alleges that he “slipped and fell injuring [his] head and lower back.” (*Id.* at ¶ 7.) Plaintiff alleges that there was “filth all over [his] back and back of [his] head]” and that he was left lying in “the same wet clothing with filth.” (*Id.* at ¶ 7-8.)

Plaintiff claims that he notified Defendants Myers, Tamentes, and McHenry of his injuries but they ignored him and left him “to suffer in pain.” (*Id.* at ¶ 9.)

¹ In a prior Order, the Court dismissed Plaintiff’s medical-needs deliberate indifference and excessive force claims. (ECF No. 30.) The sole remaining claim in this matter is now the conditions of confinement claim. The allegations recounted herein relate only to that claim.

² Pinpoint citations to pages in documents filed on the Court’s docket refer to the page numbers electronically-generated by the CM/ECF system.

³ All Defendants are alleged to be San Diego County Sheriff Deputies.

1 Later on that night, Corporal Rodriguez⁴ conducted a cell check. (*Id.* at ¶ 11.)
2 Plaintiff alleges that he stopped Corporal Rodriguez, showed him his injuries, the condition
3 of the cell, and the “wet clothes with filth [he] was wearing.” (*Id.*) Plaintiff claims that
4 Corporal Rodriguez told Plaintiff that he would have Plaintiff taken to medical. (*Id.*)
5 Plaintiff alleges that he was taken to medical later that night. (*Id.* at ¶ 13.)

6 When Plaintiff was escorted back from medical, he alleges that he again asked for
7 cleaning supplies but was not provided any. (*Id.* at ¶ 15.) From April 5, 2015 to April 11,
8 2015, Plaintiff alleges that he requested cleaning supplies every day, but Defendants failed
9 to provide them. (*Id.* at ¶ 19.)

10 Plaintiff claims that as a result of conditions in his cell, “insects started coming into
11 the cell” and crawling on him while he “was asleep on top bunk.” (*Id.* at ¶ 19.) Plaintiff
12 alleges that he showed these insects to Defendant Simmons, and Simmons told Plaintiff
13 that he would have his Deputies bring cleaning supplies. (*Id.*) Plaintiff claims this was
14 never done and “wrote a grievance on Defendant Simmons.” (*Id.* at ¶ 21-22.)

15 The next day, Plaintiff spoke to Lieutenant Kania⁵ regarding the condition of the
16 cell. (*Id.*) Plaintiff alleges Kania had his celled cleaned and no insects returned. (*Id.* at ¶ 24.)

17 **B. Defendants’ Statement of the Facts**

18 Defendants’ Motion and attached Declarations provide an explanation of the
19 incidents from April 5, 2015 to April 11, 2015, which is contrary to Plaintiff’s account.

20 Plaintiff was brought to Cell #110 by Defendants at about 3:00 p.m. (Exhibit A –
21 Aliyev Decl. at ¶ 2.) An inmate had “clogged the sink, and perhaps the toilet,” earlier that
22 day, causing “water to overflow.” (Aliyev Decl. at ¶ 2; Exhibit C – Hvizdzak Decl. at ¶ 2.)
23 The water in the cell had been shut off, and the inmate had been placed in another holding
24 area. (Hvizdzak Decl. at ¶ 2.) Defendants have submitted declarations stating that they “do
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27 ⁴ Corporal Rodriguez is not a Defendant in this case.

28 ⁵ Lieutenant Kania is not a Defendant in this case.

1 not recall,” “do not remember,” or had “no memory” of seeing “standing puddles,” seeing
2 or smelling “filth,” or perceiving any physical safety issues in the cell. (Aliyev Decl. at ¶ 2;
3 Exhibit B – Garcia Decl. at ¶ 2; Hvizdzak Decl. at ¶¶ 3, 5; Exhibit D – Myers Decl. at ¶ 2;
4 Exhibit E – Talamantes Decl. at ¶¶ 3, 4; Exhibit G – Maul Decl. at ¶ 2; Exhibit H –
5 Simmons Decl. at ¶ 2.) Defendants further allege the same with respect to denying Plaintiff
6 cleaning supplies. (Aliyev Decl. at ¶ 7; Garcia Decl. at ¶ 3; Hvizdzak Decl. at ¶ 8; Maul
7 Decl. at ¶ 3; Simmons Decl. at ¶ 3.) Nor do they recall denying Plaintiff medical assistance.
8 (Myers Decl. at ¶¶ 3-4; Talamantes Decl. at ¶¶ 2-3; Exhibit F – McHenry Decl. at ¶ 3.)

9 II. DISCUSSION

10 A. Legal Standard: Motion for Summary Judgment

11 Federal Rule of Civil Procedure 56(a) mandates the grant of summary judgment “if
12 the movant shows that there is no genuine dispute as to any material fact and the movant
13 is entitled to judgment as a matter of law.” The standard for granting a motion for summary
14 judgment is essentially the same as for the granting of a directed verdict. Judgment must
15 be entered “if, under the governing law, there can be but one reasonable conclusion as to
16 the verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). But “[i]f
17 reasonable minds could differ,” judgment should not be entered in favor of the moving
18 party. *Id.* at 251; *see also Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007)
19 (“If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary
20 judgment must be denied.”) (alteration omitted).

21 The parties bear the same substantive burden of proof as would apply at a trial on
22 the merits, including plaintiff’s burden to establish any element essential to their case.
23 *Anderson*, 477 U.S. at 252; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Lack of
24 genuine issues of material fact on a single element of a claim for relief is sufficient to
25 warrant summary judgment on that claim. *Celotex Corp.*, 477 U.S. at 322-23.

26 The moving party bears the initial burden of identifying the elements of the claim in
27 the pleadings, or other evidence, and “‘showing’ — that is, pointing out to the district court
28 — that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325;

1 *see also* Fed. R. Civ. P. 56(c). “A material issue of fact is one that affects the outcome of
2 the litigation and requires a trial to resolve the parties’ differing versions of the truth.”
3 *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

4 The burden then shifts to the nonmoving party to establish beyond the pleadings,
5 that there is a genuine dispute for trial. *Celotex Corp.*, 477 U.S. at 324. To successfully
6 rebut a properly supported motion for summary judgment, the nonmoving party “must
7 point to some facts in the record that demonstrate a genuine issue of material fact and, with
8 all reasonable inferences made in the plaintiffs’ favor, could convince a reasonable jury to
9 find for the plaintiff.” *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir.
10 2000) (citing Rule 56; *Celotex Corp.*, 477 U.S. at 323; *Anderson*, 477 U.S. at 249).

11 “When opposing parties tell two different stories, one of which is blatantly
12 contradicted by the record, so that no reasonable jury could believe it, a court should not
13 adopt that version of the facts for purposes of ruling on a motion for summary judgment.”
14 *Scott v. Harris*, 550 U.S. 372, 380 (2007).

15 **B. Defendants Are Not Entitled To Summary Judgment On Plaintiff’s Eighth** 16 **Amendment Claim**

17 The Eighth Amendment protects prisoners from inhumane conditions of
18 confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006). To prevail on a
19 conditions of confinement claim, a prisoner must establish that prison officials were
20 deliberately indifferent to a substantial risk of harm to his health or safety. *Johnson v.*
21 *Lewis*, 217 F.3d 726, 731 (9th Cir. 2000).

22 **1. Objective Prong: Substantial Risk of Harm**

23 Prison officials must ensure that prisoners have adequate shelter, food, clothing,
24 sanitation, medical care, and personal safety. *Johnson*, 217 F.3d at 731. To determine
25 whether a particular deprivation violates the Eighth Amendment, the Court must examine
26 the “circumstances, nature, and duration of [the] deprivation.” *Id.* Such a determination is
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1 highly fact-specific. *Lamb v. Howe*, 677 Fed. Appx. 204, 209 (6th Cir. 2017); *see also*
2 *Johnson*, 217 F.3d at 731.

3 The Ninth Circuit proscribes the subjection of a prisoner to a lack of sanitation that
4 is “severe and prolonged.” *Anderson v. County of Kern*, 45 F.3d 1310, 1315 (9th Cir. 1995).
5 The failure to provide adequate cleaning supplies to inmates may amount to a violation of
6 the Eighth Amendment. *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). In
7 *Hoptowit*, the court found that, in light of a failing plumbing system, vermin infestation,
8 and inadequate ventilation, the “failure to provide adequate cell cleaning supplies”
9 deprived “inmates of tools necessary to maintain minimally sanitary cells” which “amounts
10 to a violation of the Eighth Amendment.” *Id.*

11 In *Johnson v. Lewis*, 217 F.3d 726 (9th Cir. 2000), inmates were confined to a yard
12 for four days in 94-degree heat, with insufficient access to toilets, inedible food, and
13 insufficient amounts of water. *Id.* at 729-32. The Ninth Circuit reversed summary judgment
14 because the inmates’ evidence, if believed, sufficed to create a triable issue as to whether
15 the inmates’ deprivations were “sufficiently serious to satisfy the objective component of
16 an Eighth Amendment claim.” *Id.* at 732.

17 By contrast, the short-term deprivation of bathroom facilities, without more, is
18 insufficiently grave to form the basis of an Eighth Amendment violation. *See, e.g.,*
19 *Anderson*, 45 F.3d at 1314. In *Anderson*, prison officials routinely confined violent and
20 suicidal inmates to a “safety cell” for short periods of time which had a “pit toilet . . .
21 encrusted with excrement and urine.” *Id.* at 1313. The court in *Anderson* indicated that lack
22 of a sanitary toilet for a night, combined with nothing else, does not support a conditions
23 of confinement claim. *Id.* at 1313-14.

24 Similarly, the plaintiff in *Oubichon v. Carey*, 2017 U.S. Dist. LEXIS 75378 (E.D.
25 Cal. May 16, 2017) (unpublished) alleged a lack of access to a sanitary toilet for one night
26 due to a riot. *Id.* at *17. The court granted summary judgment because the plaintiff did not
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1 submit evidence of serious health hazards, such as prolonged duration, pest infestations or
2 extreme heat. *Id.* at *20. Rather, the crux was that he slipped and fell. *Id.*

3 Other cases have held that inoperable toilets causing flooding may violate the Eighth
4 Amendment if the unsanitary condition persists for several days. In *Despain v. Uphoff*, 264
5 F.3d 965, 971 (10th Cir. 2001), 36 hours without working toilets and concomitant exposure
6 to other inmates' urine and feces was sufficiently serious to state a conditions of
7 confinement claim. *Id.* at 974-75. In *Arellano v. Ojeda*, 660 Fed. Appx. 552 (9th Cir. 2016)
8 (unpublished), the court found a cognizable claim where the plaintiff alleged the toilet in
9 solitary confinement overflowed for several days and defendants failed to address it. *Id.*

10 Defendants minimize the nature of Plaintiff's allegations and argue that, just as in
11 *Oubichon*, this case is nothing more than a simple slip-and-fall case and that, without more,
12 Plaintiff cannot establish the "objective" prong of a conditions of confinement claim at
13 trial. However, the glaring problem with Defendants' motion is this misguided starting
14 point. The logical fallacy in their argument begins when they characterize Plaintiff's case
15 as a simple slip-and-fall case and then proceed to attack that incorrect characterization.
16 Thus, all of the simple slip-and-fall cases they rely on are distinguishable from this case.
17 Plaintiff complains about prolonged exposure to standing water that contained urine, feces,
18 and food debris while his multiple requests for cleaning supplies and complaints about the
19 cell's conditions went ignored. Plaintiff's slip-and-fall is just one additional consequence
20 of the apparent unsanitary and unsafe conditions of his confinement. He further contends
21 he fell and became covered by some or all of these substances and continued to be covered
22 by them. Plaintiff's allegations are of serious health hazards and substandard living
23 conditions that, if believed, could lead a reasonable jury to find in Plaintiff's favor.⁶

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26 ⁶ The distinction between simple slip-and-fall cases and this case is prudent, but as
27 indicated misses the mark in this case. It would indeed seem improper and unjust to hold
28 prison officials liable for serious constitutional violations based on momentary or
temporary conditions about which they did not have knowledge or no realistic opportunity
to remediate. Such inequity, however, diminishes when prison officials place an inmate

1 Moreover, Defendants have not presented evidence that conclusively—or even
2 minimally—vitiates the evidence contained in Plaintiff’s declaration. By only presenting
3 equivocal testimonial evidence, all Defendants have done is create a dispute of material
4 fact. The evidence is not so one sided that the trier of fact would have no choice but to
5 decide one way or the other. Inconclusive and noncommittal statements made by
6 Defendants, such as “I can’t recall,” do not necessitate the conclusion that the unsanitary
7 conditions did not exist. Such qualified language is not forceful or particularly confidence-
8 inspiring, and it is wholly possible a jury would not give it much, or any, weight. A jury,
9 hearing Plaintiff’s unqualified version of events describing a filth-filled cell, would then
10 hear Defendants’ “I can’t recall,” “I do not remember,” “I have no memory”⁷ testimony
11 and determine which version of events to believe. That analysis requires precisely the type
12 of witness credibility determination that is within the ambit of the jury—not this Court on
13 summary judgment.

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16 inside a cell that had been recently flooded and was still wet—as several Defendants admit
17 was the case here—and then proceed to ignore the inmate’s pleas and complaints about
18 unsanitary conditions for a prolonged period of time—as Plaintiff’s declaration evidences.

19 ⁷ The salient point is that these phrases could be interpreted in different ways. They could
20 mean that the declarant has no present memory of the conditions of the cell. Or they could
21 mean that the declarant remembers the conditions of the cell, but the conditions were not
22 as Plaintiff describes. The Court is simply not equipped to resolve this ambiguity on a cold
23 record. This ambiguity, of course, is the result of the declarations’ drafter’s poor use of
24 imprecise language that could be interpreted in materially divergent ways. The drafter
25 simply could have used definitive language such as, for example, “The cell did not contain
26 any large puddles,” (*cf.* Aliyev Decl. at ¶ 3 (“I do not recall any large puddles in the cell.”))
27 or “There was no standing water in the cell at the time Na was placed there,” (*cf.* Hvizdzak
28 Decl. at ¶ 5 (“I do not remember seeing any standing water in the cell at the time Na was
placed there”)). A jury—based on the witnesses’ demeanor, tone of voice, or clarifying
follow-up questions—could find that Defendants do not presently remember the condition
of the cell. Or the jury could find that Defendants remember that the cell contained no
standing water. Given the state of evidence before the Court, it would be most appropriate
for a jury to resolve the ambiguity that pervades Defendants’ declarations.

1 Because finding in Defendants' favor would require a credibility determination and
2 disregarding competent evidence presented by Plaintiff, a genuine issue of material fact
3 regarding the conditions of Cell #110 exists. Accordingly, judgment should not be entered
4 in favor of Defendants.

5 **2. Subjective Prong: Deliberate Indifference**

6 To establish deliberate indifference, a plaintiff must prove that "the official knows
7 of and disregards an excessive risk to inmate health and safety." *Farmer v. Brennan*, 511
8 U.S. 825, 837 (1994). Whether an official possessed such knowledge "is a question of fact
9 subject to demonstration in the usual ways, including inference from circumstantial
10 evidence." *Id.* at 842.

11 While the failure to give advance notice is not dispositive, if the trier of fact believes
12 the plaintiff informed officers of the conditions and interprets their response as reflecting
13 a conscious disregard of the plaintiff's needs and rights, an Eighth Amendment violation
14 could be found. *See id.* at 848. In *Torres v. Arellano*, 2017 U.S. Dist. LEXIS 43555 (E.D.
15 Cal. Mar. 24, 2017), the plaintiff alleged that he told the defendant officer about his urine
16 and bloodstained bed while the defendant claimed he could not recall learning of the
17 knowledge. *Id.* at *17. The court found a trier of fact might believe the plaintiff, the
18 defendant's lack of action might be interpreted as conscious disregard, and thus summary
19 judgment could not be granted. *Id.*

20 Prison officials who know of a substantial risk to inmate health may be free from
21 liability if they respond to the risk in a reasonable manner, even if the harm is not averted.
22 *Farmer*, 511 U.S. at 844. In *Oubichon*, while the plaintiff alleged he told the defendants
23 about the unsanitary toilet, the condition arose in the midst of two riots. *Oubichon v. Carey*,
24 2017 U.S. Dist. LEXIS 75378, at *18 (E.D. Cal. May 16, 2017). The court concluded the
25 one day exposure to an unsanitary toilet did not amount to deliberate indifference because
26 it was necessary for prison officials to focus on inmate safety in the face of riots and lasted
27 only as long as was needed to restore order. *Id.* at *20.

1 Defendants argue that, even if Plaintiff can show objectively inhumane prison
2 conditions existed, he cannot show that Defendants knew of and disregarded any excessive
3 risks to health and safety. *See Farmer*, 511 U.S. at 834, 837. Specifically, Defendants argue
4 that because they have alleged that they do not recall any threats to Plaintiff's safety other
5 than a wet floor, Plaintiff cannot prove that Defendants were deliberately indifferent to an
6 excessive health risk. (*See Def's Mot.* at 8-9.) This argument is unpersuasive. Plaintiff has
7 submitted his own testimony that each of the Defendants were made aware of the
8 conditions of the cell, they were aware of the urine and feces near the toilet and insect
9 infestation of his cell, that they were aware that he asked for cleaning supplies, they either
10 denied or ignored the requests, and that they were aware that his clothes were wet and
11 soiled. A reasonable jury, crediting Plaintiff's testimony, could find in his favor. And for
12 the same reasons explained above, Defendants' declarations simply highlight the existence
13 of genuine issues of material fact. Given that the only evidence is testimony presented by
14 both sides, a credibility determination is required. A reasonable jury could find an Eighth
15 Amendment violation if it believes Defendants knew about the conditions of Plaintiff's cell
16 and interprets their responses (or the lack thereof) as demonstrating a conscious disregard
17 of Plaintiff's needs and rights. At this stage in the proceedings, with all reasonable
18 inferences made in the Plaintiff's favor, the Court cannot conclude that a reasonable jury
19 could not find for Plaintiff.

20 Even if Defendants' declarations were not equivocally phrased and they had all
21 definitively testified, as they argue in their reply brief, that "all five of the Defendants
22 present on the day of Plaintiff's transfer have stated they did not observe anything leading
23 them to believe the cell was in an unsafe condition," (ECF No. 46 at 2), this still would not
24 entitle them to judgment as a matter of law. By relying on their declarations and ignoring
25 Plaintiff's declaration, Defendants ask this Court to make the type of credibility
26 determination that it cannot make at this stage without some indication that Plaintiff's
27 declaration is untrustworthy. But they presented no reason to discount the credibility of
28 Plaintiff's declaration. The fact that their version of events conflicts with Plaintiff's version

1 is not a valid reason to discount credibility as a matter of law and disregard his declaration
2 *in toto*. For example, there is no deposition testimony where Plaintiff contradicts anything
3 in this declaration. Such evidence perhaps could have allowed the Court to discount
4 Plaintiff's declaration. However, there is no basis before the Court to do such a thing.
5 Ultimately, all Defendants have done here is highlight the fact that this case truly is a matter
6 of he-said-they-said, and the jury should determine which version is worthy of belief.

7 Defendants also contend negligence is an insufficient basis for an Eighth
8 Amendment violation. (ECF No. 38-2 at 8.) In doing so, they again mischaracterize
9 Plaintiff's allegations and then attack that strawman.⁸ Plaintiff's case is not simply about
10 his cell being wet and his fall as a result. He further claims his cell contained urine, feces,
11 and food debris. He further contends he fell into these substances and was left in that
12 condition. Defendants contend Plaintiff cannot prove they knew about the alleged
13 conditions of his cell. However, he certainly can so prove if a jury believes his version of
14 events that he made each Defendant aware of the conditions of the cell. Again, what this
15 case comes down to is a battle of vastly different testimony—only one of which can be
16 true. Given that Defendants have provided the Court no reason to believe Plaintiff's
17 testimony is false (their own self-serving testimony does not prove such falsity), that
18 determination is for the jury to make.

19 **C. Plaintiff's Motions for Appointment of Counsel**

20 Plaintiff moves for appointment of counsel because he contends the case is complex,
21 he has limited knowledge of the law, he is unable to afford an attorney, and he has had
22 difficulty obtaining discovery.⁹ Based on the Court's recommendations above, this case
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24 ⁸ For example, they state: "While it is not ideal to have damp or wet floors" (ECF No.
25 38-2 at 9.) Plaintiff's complaints *begin* with these allegations; they do not *end* there. And
26 Plaintiff's allegations certainly go beyond "damp" floors.

27 ⁹ Plaintiff states he has spoken to CJA panel attorney David Zugman, who agreed to take
28 Plaintiff's case. However, while Plaintiff communicated with Mr. Zugman, counsel made
no commitment to represent him. Although Mr. Zugman would not mind handling the case,

1 will proceed to trial if the District Judge agrees and the case does not settle. Because pro
2 bono counsel would assist Plaintiff with trial-related matters and assist the efficient
3 presentation of the case to a jury, this Court recommends appointment of counsel.

4 “There is no constitutional right to appointed counsel in a § 1983 action.” *Rand v.*
5 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (partially overruled en banc on other
6 grounds). Thus, federal courts do not have the authority “to make coercive appointments
7 of counsel.” *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 310 (1989); *see also United States v.*
8 *\$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995).

9 District courts do have discretion, however, pursuant to 28 U.S.C. section
10 1915(e)(1), to request that an attorney represent indigent civil litigants upon a showing of
11 exceptional circumstances. *See Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1103 (9th
12 Cir. 2004). “A finding of the exceptional circumstances of the plaintiff seeking assistance
13 requires at least an evaluation of the likelihood of the plaintiff’s success on the merits and
14 an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the complexity of
15 the legal issues involved.’” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th
16 Cir. 1986)); *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

17 Here, given that Plaintiff has successfully demonstrated that a genuine dispute of
18 material fact exists for trial, appointment of counsel is appropriate. Based on the evidence
19 submitted to the Court, a jury very well could credit Plaintiff’s account of events and find
20 in his favor. Thus, there is a likelihood that Plaintiff could succeed on the merits.
21 Additionally, given Plaintiff’s status as a prisoner and the myriad limitations imposed on
22 him as a result of that status, appointment of pro bono counsel would significantly assist
23 him in the presentation of his case to a jury as well as facilitate the efficient use of the
24 Court’s time and resources. The Court should therefore exercise its discretion and appoint
25 Plaintiff pro bono counsel.


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28 he does not believe it would be appropriate to circumvent the normal, random attorney
appointment process and assign the matter directly to him.

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This Court further RECOMMENDS that Plaintiffs' motions for appointment of counsel (ECF Nos. 37, 44) be GRANTED.

IT IS ORDERED that no later than November 3, 2017, any party to this action may file written objection with the Court and serve a copy on all parties. The document shall be captioned “Objections to Report and Recommendation.”

IT IS SO ORDERED.


Hon. William V. Gallo
United States Magistrate Judge